UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALASKA COMMUNICATIONS SYSTEMS HOLDINGS, INC. **Case No. 19-RC-226955**

Employer

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, AFL-CIO

Petitioner

EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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I. STATEMENT OF THE CASE

Despite Regional Director Ronald K. Hooks specifically describing the petitioned-for unit as "***inappropriate,***" and neither party seeking to change the petitioned-for unit through a Statement of Position or in response to a Statement of Position, Regional Director Hooks somehow contrived to direct an *Armour-Globe* election to add 13 Hillsboro, Oregon employees into a bargaining unit of over 300 members in Anchorage, Alaska. Decision and Direction of Election ("DDE") at 24. Alaska Communications Systems Holdings, Inc. (herein "Employer" or "Alaska Communications" or "Company") submits this brief in support of its Request for Review of Regional Director Hook's December 18, 2018 DDE directing a *Globe* election pursuant to a petition filed by the International Brotherhood of Electrical Workers, Local 1547 ("IBEW" or "1547" or "Union").

The Employer makes this Request for Review (1) because a substantial question of law and policy is raised by the Regional Director's departure from officially reported Board precedent; (2) because the Regional Director's decision on a number of substantial factual issues is clearly erroneous on the record, and these errors prejudicially affect the rights of the Company, (3) the conduct of the hearing or the rulings made in connection with the proceeding has resulted in prejudicial error; and (4) there are compelling reasons for reconsideration of important Board rules or policies. *See* 29 C.F.R. § 102.67(d).

As fully discussed below, the Board should grant the Employer's Request for Review because the Regional Director's Decision ignored and misapplied controlling precedent. In addition, the Regional Director made findings that were either unsupported by, or contrary to, the testimony and documentary record evidence. Contrary to the conclusions reached in the Regional Director's Decision, as the record and controlling case law demonstrate, the Regional Director had

a duty to dismiss the petition because the petitioned-for unit was, as specifically described multiple times by the Regional Director, ***inappropriate***.

II. THE REGIONAL DIRECTOR CLEARLY AND UNMISTAKABLY DEVIATED FROM THE BOARD'S PRECEDENT AND CURRENT REPRESENTATION CASE RULES

Alaska Communications provides telecommunications services in Alaska. Residential customers and businesses of all sizes receive local phone service, long-distance phone service, Internet, and private data services from the Company.[1] The IBEW represents a group of employees that work for the Employer in Alaska. Alaska Communications and IBEW, Local 1547 (referred to jointly as "Parties") have a long standing collective bargaining relationship, including at least five (5) collective-bargaining agreements or extensions since 1999. The current collective-bargaining agreement ("CBA" or "Agreement") expires on December 31, 2023, and covers wages, hours, and other working conditions. *See* UX-30, Art. 1.

Most importantly for current purposes, the Agreement specifically states that it applies "within the State of Alaska." *See id.* at Art. 1.3. In fact, the Employer has never had any collective-bargaining relationships for employees that it employs outside of the state of Alaska. For example, for about a decade the Company has maintained operations in Hillsboro, Oregon.

Indeed, in or about October 2008, the Employer purchased WCI Cable Systems. Tr. 16–17, 22; Tr. 319. WCI was a non-union company that operated submarine cables. Tr. 249. With the Company's purchase, WCI became the "Cable Systems Group." Tr. 304–05, 844. Alaska

[1] The designation "Tr." shall refer to transcript page citations, the designation "DDE" shall refer to the Regional Director's December 18, 2018 Decision and Direction of Election in this matter, the designation "JX" shall refer to joint exhibits received into evidence, the designation "RX" shall refer to exhibits offered by the Company and received into evidence, and the designation "UX" shall refer to exhibits offered by the Petitioner labor organization and received into evidence.

Communications employees that work in Oregon consider themselves part of the Cable Systems Group.

On September 7, 2018, the IBEW filed a representation petition requesting an *Armour-Globe* for all "Network Operations Specialists, Senior Network Operations Specialists, Network Operations Technicians, Senior Network Technicians, Senior Team Leads, Senior Administrative Assistants, Submarine Cable Operations Technicians and Cable Systems Network Operations Supervisors ***working for Alaska Communications in Oregon***. . . ." This specifically described the Oregon employees working for the Company performing functions for the Cable Systems Group.

On September 17, 2018, the Employer timely filed its position statement ("Position Statement") with Region 19. The Position Statement noted multiple issues and specifically noted "[t]he petitioned-for unit and the existing unit do not share a sufficient community of interest." The Position Statement made no attempt to expand the petitioned-for unit or alter the unit's composition in any way.

On September 18, 2018, pursuant to Section 102.66(d) the Union had an opportunity to respond to the Employer's Position Statement. The Record transcript leaves this opportunity very clear:

Hearing Officer: Mr. Wielechowski, what is your position with respect to the issue raised by the Employer in its position – in its statement of position with respect to the community of interest issue with the proposed unit and the existing unit?

Union Counsel: We believe there is a community of interest that is shared between the ***Alaska unit*** and ***the Oregon unit that is being proposed***. So we disagreed with their position.

Tr. 10:24–11:7 (emphasis added).

Section 102.66(d) makes clear that at this point the Union was precluded from raising any argument regarding including employees other than Oregon based Cable Systems Network

employees in the proposed unit. Indeed, Section 102.66(d) specifically states "[a] party shall be ***precluded*** from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument ***concerning any issue that the party failed to*** [. . .] ***place in dispute in response to another party's Statement of Position***. . . ." 29 C.F.R. § 102.66(d).

Here, Union counsel makes absolutely no mention of including any non-represented Alaska based employees in the petitioned-for unit. Union counsel makes no mention of including any Cable Systems Group employees based in Alaska in the petitioned-for unit. Rather, he emphasizes that ***Alaska represented employees*** share a community of interest with the ***Oregon petitioned-for unit***. He clearly and unequivocally excluded any Cable Systems employees that do not work in Oregon.

Following this exchange, the parties and the Hearing Officer then discussed a supervisory issue the Employer raised in its Position Statement. Tr. 11:8–12:1. Immediately after this exchange the Regional Director had his Hearing Officer list the issues for hearing:

> Hearing Officer: Okay. The Regional Director has directed that the following issues will be litigated in this proceeding. ***Number one, the issue regarding the community of interest with the petitioned-for unit and the existing unit***, and the second issue being litigated is whether or not the cable systems network operator supervisor position is a Section 2(11) supervisor position.

Tr. 12:2–8 (emphasis added).

Here, through the Hearing Officer, the Regional Director directed that the parties litigate whether the established ***Alaska bargaining unit*** and the ***petitioned-for Oregon unit*** shared a community of interest. The Regional Director did not frame the issue as to whether the established Alaska bargaining unit shared a community of interest with a bargaining unit or a group of employees in Oregon in combination with Alaska based unrepresented employees. Rather, the Regional Director specifically delineated that the parties would litigate "***the community of interest***

with <u>the</u> <u>petitioned-for</u> <u>unit</u> and <u>the</u> <u>existing</u> <u>unit,</u>" which means unrepresented Cable Systems Group employees in Oregon and represented employees in Alaska. Tr. 12:4–5.

The Employer later emphasized that the Rules preclude the Union from raising any issue beyond the community of interest between the petitioned-for unit and the existing Alaska unit and the Regional Director, through his Hearing Officer, agreed with the Employer:

Hearing Officer: Okay. Also, in the Employer's position statement, the Employer took the position that an appropriate unit would be a standalone unit as compared to the petition for an Armour-Globe unit that would be included with the Alaska IBEW bargaining unit.

Mr. Wielechowski, does the Petitioner wish to proceed to an election in any alternative unit if the unit sought is found to be inappropriate by the Regional Director or the Board?

Union Counsel: Yes.

Hearing Officer: State for the record please.

Union Counsel: The Union will agree to an alternate unit that is proposed by the NLRB, whether that includes the two members of the Hillsboro cable systems unit or located in Alaska, or whether that is a standalone unit in the State of Oregon. And, of course, our preferred unit is the – an Armour-Globe unit that would bring them into the ACS Alaska collective-bargaining agreement.

Hearing Officer: Position still the same, Mr. Adlong?

Employer Counsel: ***They can't amend their petition now.***

Hearing Officer: ***<u>Right</u>***.

Employer Counsel: So those two Alaska guys are out. That's what they said. They filed a petition to waive their arguments. I want to make the clear.

Hearing Officer: And the two guys we're referring to are Jacob Kelley and Steven Huff?

Employer Counsel: Steven Huff.

Hearing Officer: Okay.

Employer Counsel: They were not in the petition for a unit.

Tr. 1296:17–1297:21 (emphasis added).

Here, the Hearing Officer specifically says "***Right***" when the Employer notes that the Union cannot amend their petition. In other words, the Regional Director's representative confirms on the Record that the Union has waived that position and/or that Rules preclude adjusting their position. 29 C.F.R. § 102.66(d) could not be clearer that the Rule precludes a party from pursuing an issue that the party fails to raise via a position statement or in response to a position statement.

Furthermore, the exchanges above highlight the very issues that the new rules sought to avoid. Specifically, at the beginning of the hearing, when asked the Union's position on the issue raised by the Employer's position statement and when Section 102.66(d) requires that a party raise any issue or place an issue in dispute, Union Counsel says "[w]e believe there is a community of interest that is shared between the ***Alaska unit*** and ***the Oregon unit that is being proposed***. So we disagreed with their position." Tr. 11:4–7 (emphasis added). The reference to the proposed Oregon unit makes clear that the Union does not seek any unrepresented employees in Alaska. *Id.*

After making this position clear, at the end of the hearing Union counsel changes the Union's position stating "[t]he Union will agree to an alternate unit that is proposed by the NLRB, whether that includes the two members of the Hillsboro cable systems unit or located in Alaska, or whether that is a standalone unit in the State of Oregon." Tr. 1297:3-9. He then also continues, stating "[a]nd, of course, our preferred unit is the – an *Armour-Globe* unit that would bring them into the ACS Alaska collective-bargaining agreement." In addition, in its post-hearing brief the IBEW asserts "[t]he argument that the geographic distance presents an insurmountable challenge is also blunted by the fact that two of the Cable Systems Department employees, Jacob Kelley and Steven Huff currently work – and have worked – in Anchorage for years," Union Brief 17, which

position the Regional Director then adopts. The Rules prohibit approaching the issues in this way. 29 C.F.R. § 102.66(d).

The Board has reiterated this point. In *Brunswick Bowling Products, LLC*, the Board specifically said, "Section 102.66 governs the conduct of the hearing, and Section 102.66(d), the preclusion provision, specifically ***precludes a defaulting 'party' from raising an issue it was required to but failed to timely raise***." 364 NLRB No. 96 (2016) (emphasis added). Here, the Union did not mention including unrepresented Alaska employees in the unit when questioned by the Hearing Officer. According to the Rules and recent Board precedent, that failure precludes it from raising the issue.

The Regional Director and the Union will certainly take the position that, like *Brunswick*, Regional Director Hooks can consider and receive evidence concerning any issue necessary. Here, however, the community of interest issue that the Parties litigated only considered the "***community of interest with the petitioned-for unit and the existing unit."*** The answer to the question is a that community of interest exists between the petitioned-for unit and the existing unit or that no a community of interest does not exist between the petitioned-for unit and the existing unit. Very simple.

In fact, the Regional Director answered this question multiple times in the DDE stating that the Union's decision to exclude employees because they work in Anchorage "simply because they work outside Oregon, would unduly fragment the workforce and render the proposed Voting Group an irrational and indistinct one." DDE at 23. The Regional Director later stated "[a]s noted above, I find that the use of a geographic separation to define Cable Systems Group, according to the language of the Petition, ***would have rendered the Voting Group inappropriate***." Indeed, the Regional Director made this point clear not once, but twice! Those statements end the community

of interest inquiry. The Regional Director stated at the beginning of the hearing the Parties were litigating "***the issue regarding the community of interest with the petitioned-for unit and the existing unit."*** *The Regional Director left beyond doubt that the petitioned-for unit did not have a community of interest with the Alaska unit. The Regional Director also deemed the petitioned-for unit inappropriate.* That ends the inquiry.

The Union will likely argue that *Brunswick* stands for the proposition that the Rules do not preclude the Regional Director from addressing an issue. *Brunswick Bowling Products, LLC,* 364 NLRB No. 96 (2016). The facts in *Brunswick* differ substantially from the current issue. Specifically, that case addressed the issue of a contract bar. *Id*. The petition itself noted the contract and established Board precedent specifically prohibits a petition when a collective-bargaining agreement exists between an employer and a union. Here, the facts differ substantially. At no time during the existence of the Act has the Board expected a Regional Director to rescue an inappropriate petitioned-for unit. *See e.g. Arbor Construction Personnel, Inc.*, 343 NLRB 257 (2004) (Regional Director's direction of election reversed where petitioned-for unit was inappropriate).

While the Regional Director cites *Fleming Foods, Inc.*, 313 NLRB 948, 950 (1994), and lauds this case as established precedent, the Board has cited this case seven times. The Board has never cited it for the proposition that a Regional Director can add unlitigated employees into a proposed unit. *Fleming* relates to residual units. Neither the transcript nor DDE even contains the word "residual."

With respect to the use of *Fleming,* the Regional Director argues the record contains ample evidence regarding the Alaska based employees and that they fill positions listed in the petition. Those arguments fail. First, when the Regional Director described the issues to litigate, he never

mentioned unrepresented Alaska based employees. Second, when the Employer's counsel stated that the Union could not amend the petition, the Regional Director's Hearing Officer stated "***Right***." Tr. 1297:12–13. The Regional Director never directed the Parties to address the issue after Employer's counsel raised the preclusion issue (even when both Parties had the opportunity to file briefs). Third, the argument that Alaska based employees fill positions like that of a petitioned-for group in Oregon means nothing when the petition only requests Oregon.

The Rules simply preclude the Union from arguing for the inclusion of two Alaska based employees. Similarly, the Rules and due process standards prohibit the Regional Director's DDE from adding employees to a petitioned-for unit because that was unnecessary to determine the issue litigated at hearing: whether the petitioned-for unit of Oregon employees shared a community of interest with Alaska based represented unit. The Regional Director left no doubt that the Union sought an inappropriate unit. Regional Directors must dismiss petitions for inappropriate units. *See e.g. Arbor Construction Personnel, Inc.*, 343 NLRB 257 (2004) (Regional Director's direction of election reversed where petitioned-for unit was inappropriate). The Board must correct the Regional Director's error.

III. THE REGIONAL DIRECTOR DEPRIVED ALASKA COMMUNICATIONS OF DUE PROCESS GUARANTEES BY DECIDING AN ISSUE THAT THE EMPLOYER POSSESSED NO NOTICE OR OPPORTUNITY TO ADDRESS

"The Board's duty to ensure due process for the parties in the conduct of the Board proceedings requires that the Board provide parties with the opportunity to present evidence and advance arguments concerning relevant issues."

Bennett Industries, Inc., 313 NLRB 1363, 1363 (1994).

The Regional Director disregarded Fifth Amendment guarantees of due process through his ruling on the unit scope. For over 80 years, the Supreme Court has recognized that due process protections apply to administrative actions. *Morgan v. United States*, 298 U.S. 468 (1936). The Supreme Court specifically explained as follows, "'[t]he fundamental requisite of due process of

law is the opportunity to be heard'" at "'a meaningful time and in a meaningful manner.'" *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Within the context of representation cases, Section 9(c) of the Act and Section 102.60-67 of the Board's Rules both ensure compliance with due process requirements by providing for a full hearing. An agency violates due process when its decision-maker following a hearing "has not considered evidence or argument" on an issue. *Morgan*, 298 U.S. at 481.

The Board, in cases like *Bennett Industries*, has repeatedly recognized the importance of due process guarantees. For example, in *Barre-National, Inc.*, 316 NLRB 877 (1995), the Board overturned on due process grounds a Regional Director's decision to proceed to an election without receiving evidence on a disputed supervisory issue. In *Angelica Healthcare Services Group, Inc.*, due process and statutory concerns also resulted in vacation of a Regional Director's decision not to hold a hearing on a contract bar issue. 315 NLRB 1320 (1995). In *North Manchester Foundry, Inc.*, the Board similarly reversed a Regional Director's decision to refuse to permit introduction of evidence on a community of interest issue, 328 NLRB 372 (1999).

Further, the United States Courts of Appeals pays close attention to the Board's due process safeguards. For example, in a case closely analogous to the current circumstances, in *NLRB v. Blake Construction Co.*, the Circuit Court found a due process violation. 663 F.2d 272, 280 (D.C. Cir. 1981). In comparison to *Blake*, the employer in that case had the ability to present its case and receive Board consideration. By contrast, Alaska Communications did not have notice of the issue acted on by the Regional Director (including two Alaskan employees to create an appropriate unit), and can only challenge the outcome of the instant case through test of certification summary judgment proceedings. Consequently, if the Employer does not receive notice and an opportunity

to be heard regarding the unit found appropriate in this case, then it will receive no such opportunity to establish a factual record within the Board's processes.

The 2015 Representation Rules together with Section 9(c)'s requirement of a full hearing implement due process protections through a regimented step-by-step narrowing of the issues. When a union files a Petition under Section 102.60-61, all potential issues remain on the table, and the union must announce its positions on those issues. Section 102.63(b) then requires an employer to file a Statement of Position, which narrows the issues to only those issues the employer raises.

At this point the Regional Director, based on the petition and the Statement of Position, informs the parties of the issues they will litigate under Section 102.66(b). The rules state, that unless the Regional Director directs otherwise, "[t]he Hearing officer shall not receive evidence concerning any issues as to which parties have not taken adverse positions. . . ." Once the Regional Director specifies the issues, the Region conducts a hearing as Sections 102.64–102.66 require. At the conclusion of the hearing, Section 102.67(a) allows the Regional Director to provide the parties time to file briefs, which occurred in this case. Finally, the Regional Director closes the record and issues either a Decision and Direction of Election or Decision and Order on the disputed issues.

The process of narrowing issues and allowing only limited litigation on the remaining issues in dispute provides essential due process protections. Regarding "notice," the Director's specification of the issues under Section 102.66(b), preceded by the petition and Statement of Position, informs the parties of the issues in dispute. Regarding "an opportunity to be heard," Section 102.64(a) explains:

> Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the **party's contentions and are relevant to the existence of a question of representation.**

29 C.F.R. § 102.64(a) (emphasis added).

In other words, failure to inform the parties of the issue in dispute violates both due process and the Board's Rules. Otherwise, a party cannot realistically know what contentions to consider or what represents relevant evidence.

Conversely, if an issue is not in dispute, the Rules permit neither consideration of nor evidence regarding that issue. Section 102.66(b) states "[t]he Hearing Officer **shall not receive evidence concerning any issue as to which parties have not taken adverse positions. . . .**" (emphasis added). The Rules also allow receipt of evidence to determine the Board's jurisdiction and other issues "**which the Regional Director determines that record evidence is necessary**." 29 C.F.R. § 102.66(b) (emphasis added).

Here, the parties spent seven days at hearing, generating over 1,300 pages of transcript and dozens of exhibits. The Regional Director even allowed the Parties to file post-hearing briefs. Throughout that entire time period, neither the Regional Director nor the Hearing Officer ever announced, as an issue requiring litigation, the question of whether a unit including Anchorage employees Kelley and Huff with Oregon employees would constitute an appropriate unit. Furthermore, the petition, Position Statement, and pre-hearing specification of issues provided no indication the Regional Director would consider such a unit. Moreover, when any mention of the unrepresented Alaska employees became a topic the Employer's counsel immediately noted the Rules and the Union's inability to amend the petition and the Regional Director's representative conducting the hearing responded "***Right***" indicating the parties would not consider the issue. In addition, while allowing the Parties to file briefs, the Regional Director said absolutely nothing regarding a new issue for consideration. Tr. 1303:12–1304:15. As a result, the Employer possessed no notice that the Regional Director may rule on that issue, nor did it receive an opportunity to be heard on the issue.

Importantly, at the **outset** the Hearing Officer **did not** ask whether the Petitioner would proceed in a unit including the two Anchorage employees. To the contrary, as explained above, the issues articulated at the hearing's commencement distinguished only between Alaska and Oregon employees. Then, when the potential for a unit including these two employees was addressed at the **conclusion** of the Hearing, the Hearing Officer **agreed** that such a unit was not under consideration. If the Regional Director had identified this issue prior to the Hearing, or the Hearing Office had done so at the outset of the proceeding, the Employer could have presented evidence and contentions relevant to the issue throughout the Hearing. Instead, as the process occurred here, ***the Employer received no such notice and an opportunity to be heard on the issue the Regional Director ultimately found dispositive***.

As a result, like its decisions in cases like *Barre-National*, *Angelica Healthcare*, and *North Manchester Foundry*, the Board must protect due process guarantees by reversing the Regional Director's decision on a novel and unlitigated issue.

IV. THE BOARD CANNOT BLESS THE REGIONAL DIRECTOR'S ACTION HERE WITHOUT EXCEEDING THE ADMINISTRATIVE DEFERENCE AFFORDED TO IT BY THE COURTS

As explained by former Members Miscimarra and Johnson in their dissents to the 2015 amendments to the Rules, which the Employer hereby adopts and asserts, the Board's existing representation case rules are facially invalid. Specifically, the 2015 amendments to the Rules impermissibly infringe upon the Employer's speech by excessively curtailing the time in which all parties can voice their views on unionization. 79 Fed. Reg. 74308, at 74433, 74438-41 (Dec. 15, 2014). Similarly, the amendments undermine overall due process rights by foreclosing the right to sufficient pre-election litigation and thus denying the right to an "appropriate hearing" under Section 9(c) of the Act. *Id*. at 74437-38. Access to legal representation also suffers from the amendments' "preoccupation with speed" because parties other than the petitioner possess less

time to procure and counsel with legal counsel. *Id*. at 74436. Additionally, employee privacy rights suffer from the requirement for employers to disclose all of their contact information to an external third party, with no meaningful safeguards on how the petitioner uses that information. *Id*. at 74452. The amended Rules therefore violate the Employer's and employees' rights as guaranteed under the Act. See *id*., at 77430-77460. Furthermore, because of the due process issues implicated here, this case represents an especially appropriate vehicle for rescission of the 2015 amendments to the Rules due to their facial invalidity.

Even aside from the Rules' facial invalidity, however, any interpretation of Section 102.60-67 of the Board's Rules (describing the Petition, Statement of Position, and Hearing processes) that permits Regional Directors to conjure up and impose previously unconsidered bargaining units would also render the Rules invalid as applied. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, principally governs the standard for review of agency rulemaking. 467 U.S. 837 (1984). In *Chevron*, the Court articulated a two-step analysis. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id. at* 842–43 (footnotes omitted).

The Court continued that if it determines Congress did not directly address the precise question, "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Id*. "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

The Rules as applied by the Regional Director here would fail both steps of the *Chevron* test. The Supreme Court explained that it uses "traditional tools of statutory construction" to

determine whether an agency rule fails step one of the *Chevron* test. *Id.* at 843 n.9. It elaborated, "[f]or most judges, these tools include examination of the text of the statute, dictionary definitions, canons of construction, statutory structure, legislative purpose, and legislative history." *Id*. (citations omitted).

Here, the statutory intent is clear. In Section 9(c) of the Act Congress expressed its mandate that disputed representation case issues must receive a full hearing. Imposing a bargaining unit unspecified in a petition or considered at hearing directly contradicts that intent. Thus, incorrectly assuming *arguendo* that the Board's Rules permit such an outcome, then those Rules fail step one of the *Chevron* test, which makes them invalid.

Step two of the *Chevron* test accords with the Administrative Procedures Act's ("APA") requirement at 5 U.S.C. § 706(2)(A), which requires reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Shays v. FEC*, 414 F.3d 76, 96-97 (D.C. Cir. 2005) (observing the overlap between the APA and *Chevron* step two).

Under this standard, an agency "must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency[.]" *Id*. The Supreme Court has applied the *State Farm* articulation of the APA's "arbitrary and capricious" standard to judicial review of Board adjudicatory and rulemaking proceedings alike. *See Allentown Mack Sales and Service, Inc.*

v. NLRB, 522 U.S. 359, 374 (1998) (adjudicatory); *American Hosp. Assn. v. NLRB*, 499 U.S. 606, 618-20 (rulemaking).

The Regional Director here acted arbitrarily and capriciously by *sua sponte* declaring the unit including the two Anchorage employees appropriate based upon his review of a record that did not encompass that issue. While the Regional Director may have found some evidence briefly acknowledging the existence of those two employees in the record, he abused his discretion by extrapolating that evidence to an entirely separate community of interest issue from the one the parties litigated and one the Regional Director told the Parties that they would litigate. The Regional Director simply cannot have known what other evidence and arguments the Parties would have presented if the Parties knew that the Region would analyze that issue. The community of interest amongst the concededly inappropriate petitioned-for unit was fully litigated, but no evidence was presented, or could have been presented as relevant, regarding the community of interest amongst all employees the Regional Director subsequently elected to include (both Oregon and Alaska-based employees), and the existing unit.

Furthermore, the due process concerns discussed above cause the Regional Director's approach to run afoul of 5 U.S.C. § 706(2)(A) of the APA, which requires invalidation of agency actions that are "contrary to constitutional right, power, privilege, or immunity[.]" Those issues provide yet another independent basis to find the Board's representative case rules, as applied, invalid under *Chevron* step two.

The Regional Director's action here calls into question the validity of the Board's current representation case rules. If a Regional Director can pull a purportedly appropriate bargaining unit out of thin air, simply by adding employees mentioned in passing during a hearing, then the Rules conflict with Section 9's requirement to hold a full hearing, while also approving arbitrary and

capricious determinations. The Board cannot apply the Rules in this manner without running afoul of the Supreme Court's *Chevron* standards.

V. THE EMPLOYER'S CABLE SYSTEMS EMPLOYEES DO NOT SHARE A COMMUNITY OF INTEREST WITH THE EXISTING UNIT, WITH OR WITHOUT THE TWO ANCHORAGE EMPLOYEES

As the Regional Director found, the petitioned-for unit, which excludes Anchorage employees Kelley and Huff, cannot be combined with the exiting unit to form an appropriate unit under Section 9 of the Act. DDE at 23. As he reasoned, such a combination would result in "an irrational and indistinct" unit. *Id*. The fact that such a unit remains inappropriate requires no further discussion.

Even assuming *arguendo* the Regional Director could have added Kelley and Huff to the unit, which he could not, Cable Systems employees still cannot combine with the existing unit. The Cable Systems Group, even including those two employees, has a separate and distinct community of interest from the existing unit, just as the group excluding them has such distinct interests. The inclusion or exclusion of these two employees does not change the fact that the Employer acquired the Cable Systems Group as a separate entity, serving separate business purposes, for separate customers, and has continued to operate it separately since that acquisition. Consequently, the community of interest factors continue to require that the existing unit and the Cable Systems Group would operate as separate bargaining units.

A. The Record Reflects Separate and Distinct Communities of Interest Amongst Cable Systems Employees and the Existing Bargaining Unit.

When an incumbent union seeks to add a group of previously unrepresented employees to its existing unit, and no other labor organization participates, it must demonstrate the petitioned-for employees share a community of interest with existing unit employees. *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990); *Capital Cities Broadcasting Corp.*, 194 NLRB 1063 (1972).

A variant of the community of interest test applies when employees in the unit sought work in different geographic locations. *Exemplar, Inc.*, 363 NLRB No. 157, slip op. at *2 (2016). Under the community of interest standard, the Board examines "whether the sought-after employees' interests are sufficiently distinct from the petitioned-for group." *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at *5 (Dec. 15, 2017). In the geographic context, the Board focuses on whether the community of interest shared by one group is "separate and distinct" from that shared with the other group, and as compared to excluded locations. *Laboratory Corp.*, 341 NLRB 1079, 1082 (2004). The Petitioner conceded it possesses the burden of proof on this issue. Tr. 12–13.

That multi-location variant of the community of interest test, examines the following factors: geographic proximity; departmental organization, employee interchange; contact; common supervision; employees' skills and duties; functional integration of business operations; terms and conditions of employment; and bargaining history. *Exemplar, Inc.*, 363 NLRB No. 157, slip op. at 2 (2016). Here, the Cable Systems employees unquestionably have a separate and distinct community of interest from the community of interest shared amongst the existing bargaining unit employees.

1. The geographic differences between the Cable Systems Group and the existing unit remain significant.

The Regional Director's concerns regarding the geographic distinctions between the petitioned-for unit and the existing unit are well-founded. According to the Petitioner's own evidence, the overland distance between Portland, Oregon and Anchorage, Alaska is **2,434 miles**. UX-7; Tr. 567. For perspective, that distance roughly approximates the distance between New York City and Boise, Idaho. Furthermore, even removing the indirect element of land travel (and, in this case, the crossing of two international borders), the Petitioner calculates the airborne

distance as 1,538 miles. That distance exceeds, by approximately 100 miles, the space between Boston, Massachusetts and Omaha, Nebraska.

The Regional Director's impermissible *post hoc* addition of the two Anchorage employees does little to diminish these differences. Even considering their work in Alaska, the fact remains that 13 of the employees in the group to be added – or 87% of that group – work in Oregon. DDE at 3. Thus, the decision to include Kelley and Huff does not meaningfully alter the overall identity of the groups at issue. In fact, even after stating that they would be included, the DDE refers to the existing unit as the "Alaska unit" throughout. DDE *passim*. Thus, the Regional Director's own linguistic distinction between the two groups reflects that, even with the inclusion of Kelley and Huff, an important geographic divide exists between the "Alaska unit" and the Cable Systems employees.

Indeed, Kelley's and Huff's work focuses on supporting the Cable System work in Oregon. As the Regional Director noted, they report remotely to the facility in Hillsboro, Oregon, and "they respond to calls or assignments that serve the needs of the Hillsboro operations." DDE at 4. Thus, regardless of whether the unit includes Kelley and Huff, the *locus* of Cable Systems work remains in Oregon.

Furthermore, despite his reliance on geographic distinctions to find the petitioned-for unit inappropriate for inclusion with the existing unit, the Regional Director also attempted to minimize such distinctions by arguing that both the existing unit and the Cable Systems Group already encompass large geographic areas. This argument simply does not make logical sense. The fact that these groups cover large areas means they *already* strain the bounds of unit appropriateness, not that they are amenable to *even further* expansion. The Regional Director, rather than using existing geographic challenges to justify exacerbating the same issues, should have exercised

caution in expanding a unit to the point where it covers a significant portion of the globe's northern hemisphere.

The Regional Director's analysis also ignores those aspects of geographic distinctions that go beyond the vast distances between employees. Alaska possesses many unique geographic characteristics, including widely dispersed small communities, islands, limited accessibility (including via ice roads and ferries), and other features associated with proximity to the Arctic Circle. Tr. 786–88, 1139–1141. Neither the area in which Cable Systems employees work, nor their corporate customers, contain or experience the unique geographic circumstances familiar to the Alaskan consumers for whom existing unit employees work.

The inclusion of Kelley and Huff in the Cable Systems Group does not diminish the geographic considerations that caused the Regional Director to find a combined unit excluding them inappropriate nor does it somehow overcome the significant geographic distinctions between Alaska and Hillsboro, Oregon. DDE at 23. The fact remains that 87% of the Cable Systems Group works in Oregon. Distances of over 1,500 miles between those employees and the existing unit far exceed those the Board has found too great in other contexts. *See, e.g.*, *D&L Transportation*, 324 NLRB 160 (1997) (finding 29 miles to be too much distance); *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063 (2001) (25 miles); *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999) (6-12 miles).

Thus, even including Kelley and Huff, the geographic proximity here is so weak that the Board has rejected similarly strained units ***even where every other community of interest factors favored combination.*** *Black & Decker Mfg. Co.*, 147 NLRB 825, 828 (1964) (rejecting multi-location unit, despite significant functional integration and interchange, due to "relatively wide" geographic separation of 24 miles). Furthermore, differences in geographic service areas play an

especially important role in the utilities industry, and in such community of interest determinations. For example, in *Verizon Wireless*, 341 NLRB 483, 484 (2004), the Board closely examined both utilities industry considerations and geographic distinctions. Specifically, it considered both petitioned-for retail stores in Bakersfield, California on one hand, and excluded Northern California/Nevada and other "West Region" facilities on the other. The Board refused to presume the appropriateness of a systemwide unit, and instead found that the Bakersfield locations alone constituted an appropriate unit.

This factor clearly weighs against a community of interest and any claim that the Oregon Cable Systems Group can belong to the Alaska bargaining unit. This factor alone requires dismissal of the Petition.

2. The Cable Systems business unit stands as an indisputably distinct business unit.

Relying only upon conclusory statements and the overlapping duties of some corporate officers, the Regional Director found that "organization of the facilities" somehow weighs in favor of finding a community of interest between the existing unit and the Cable Systems Group. In fact, since its acquisition approximately nine years ago, the Cable Systems Group has operated as an organizationally independent and distinct entity.

For example, Oregon Senior Administrative Assistant Kim Daschel testified she speaks on behalf of that group to corporate representatives. Tr. 399. She also handles the Cable Systems Group's budget and inventory. Tr. 371, 388–89, 392–93. Operationally, Daschel tends to Hillsboro matters such as policy compliance and recording keeping. Tr. 404–05. Even more directly, Daschel handles customer, supplier, and vendor contract renewals for Hillsboro, including through the use of complex math for contractual Consumer Price Index calculations. Tr. 375–76. Similarly, Diana Ruhl, former long-tenured employee and current Petitioner business

representative assigned to the Employer, testified that the Cable Systems group is an independent organizational unit. Tr. 636.

In contrast to the Cable Systems Group's operation as an independent organizational unit serviced by Daschel, other employees perform those functions for bargaining unit operations in Anchorage. Tr. 414. Daschel herself has never visited Alaska, and is the only person who performs these duties for the Cable Systems Group. Tr. 410.

The Regional Director found the Cable Systems Group, "an identifiable, distinct segment of the Employer's operations." DDE at 22. The Cable Systems Group's history and status as a separate business unit provides the source of that distinctiveness. For example, these continued historical divisions result in the groups servicing different customer contractual relationships. The Board has found that separate customer contractual relationships warrant separate bargaining units. *Executive Resources Associates*, 301 NLRB 400, 401–02 (1991) (finding separate community of interests for groups of employees of a single employer working under separate contracts). The differences represent more than merely formalities. Instead, factors such as the types of customers with whom employees work have practical effects on working conditions. Consequently, the Regional Director's finding that this factor somehow weighs in *favor* of a community of interest with the existing unit defies rational explanation, and constitutes a significant error.

3. Employee interchange between the existing unit and the Cable Systems Group occurs only rarely and contact between the groups accounts for a small portion of work duties.

The Regional Director's fumbling of employee interchange evidence raises significant concerns about the validity of his analysis overall. The Regional Director made no explicit finding on the factor of employee interchange. Instead, the Regional Director found the combined "Interchangeability and Contact among Employees" factor "neutral" as a whole. *Id*. at 26.

Regarding interchange itself, he stated, "the record reveals evidence of modest employee interchange." *Id*. at 25.

The Regional Director examined two types of interchange. First, he correctly observed that temporary visits by existing unit employees to Cable Systems employees, and *vice versa*, occur on only a "rare" basis ("on average less than one stint per year"). *Id*. Second, he characterized a grand total of two permanent transfers over the course of nine years – one from the existing unit to Cable Systems, and another from Cable Systems to the existing unit – as "multiple permanent transfers." *Id*. Nowhere does the DDE explain how "rare" temporary visits and two permanent transfers over nine years could amount to evidence of "modest" interchange with an ultimately "neutral" impact on the community of interest analysis.

In fact, as the evidence acknowledged in the DDE shows, interchange between the existing unit and the Cable Systems Group is quite uncommon. That fact should weigh heavily on any examination of the relationship between the two groups. The Regional Director's mischaracterizations of the evidence in this regard, in an attempt to minimize the impact of evidence strongly supporting separate units, highlights the deficiencies in his approach to the record as a whole.

The other half of the "Interchangeability and Contact among Employees" factor the Regional Director found "neutral" also fails to support a combined unit. The DDE correctly observes, "it is clear that it is very rare for the employees to physically work side by side with each other because all points in Alaska are separated from Hillsboro by several hundred miles (or more) and/or a multiple hour flight." DDE at 26.

The DDE also, however, seeks to minimize the importance of this critical fact by asserting:

> The unique nature of a telecommunications company engaged in providing and maintaining high-speed data transport systems (fiber optic cables transmit data at

> literally the speed of light), and which operates many of its facilities remotely (even in a physical sense), means that **remote interchange is more comparable to physical interchange than it would be for most employers:**

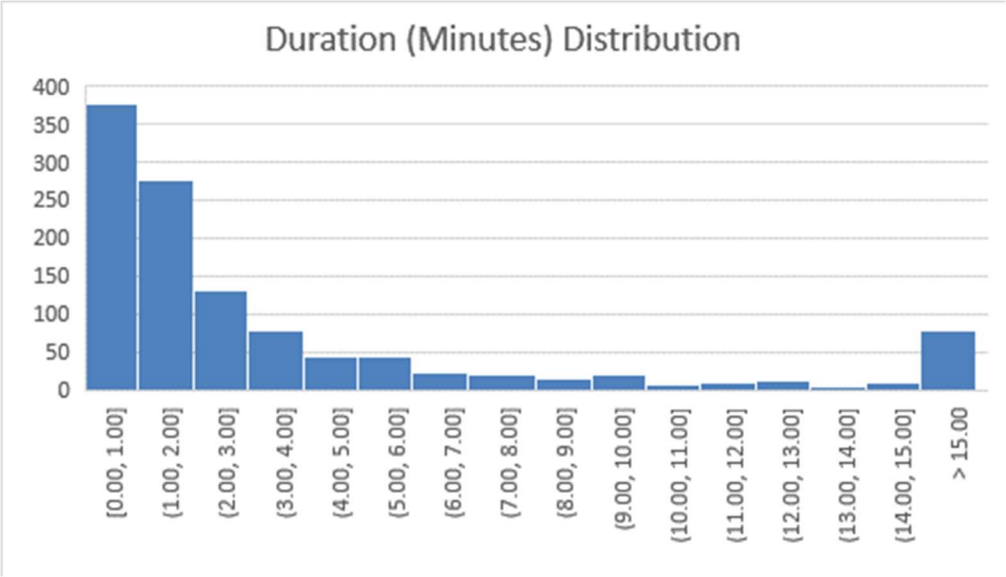
DDE at 26 (emphasis added).

Two major flaws in this analysis stand out. First, the Employer knows of no authority, and the DDE cites none, holding that the Board will evaluate the community of interest factors differently based upon the nature of an employer's products or services. Second, the term "remote interchange" appears in ***no other Board case (or Regional Director's Decision) on record***. In fact, the phrase makes little sense. "Interchange" refers to instances in which employees in one group work in the other group, and in the geographic context, at one another's locations. *Hilander Foods*, 348 NLRB 1200, 1203–04 (2006). Thus, short of teleportation technology (which the Employer does not possess), the meaning of the Regional Director's reliance on "remote interchange" is unclear.

To the extent this analysis refers to work-related contact between the two groups, the record reflects minimal such contact. The primary purpose of calls between the two groups results from the inability of one group to access the other group's network. Tr. 182–84. Multiple Cable Systems employees testified that their interactions with bargaining unit employees are quite limited. Tr. 33, 125, 132, 465.

Meanwhile, Cable Systems Group employees interact much more frequently with one another, both in person and through other means, again demonstrating their own "separate and distinct" community of interest. Tr. 28–33, 36–37, 41, 59, 259–60, 448, 452–55, 790, 796–99, 870–71. A Petitioner Oregon-based witness even testified that, unlike existing unit employees, he interacts with Anchorage-based Cable Systems employees Kelley and Huff every day, and these Anchorage-based employees have also traveled to Oregon for training. Tr. 536, 754–55.

The Record helpfully provides a quantifiable manner through which the Board may assess contact between the two groups. Interactions between the groups occur primarily via landline telephone calls (Tr. 500, 519, 835, 965), and the Employer produced the past year's call logs for incoming and outgoing calls (in accordance with the Petitioner's identification of those phone numbers in its pre-hearing Subpoena *Duces Tecum*). RX-22–33; Tr. 757. Compilation of the logs reveals several interesting statistics. For example, over the past year, the number of calls between the groups each month ranged from 58 to 126, or about 2–4 calls per day. RX-34. Even more strikingly, the median duration of those calls was only 1.58 minutes. *Id*. The calls overwhelmingly skew towards short durations, as illustrated in the following histogram and table:



RX-38.

Range	Number of Calls	% in Range of All Calls	% Below Range Max. of All Calls
0-1 Minutes	376	32.8%	32.8%
1-2 Minutes	276	24.1%	56.9%
2-3 Minutes	132	11.5%	68.4%
3-4 Minutes	82	7.2%	75.6%

RX-22-33.

In other words, about 1/3 of all calls lasted less than one minute, more than half lasted less than two minutes, more than 2/3 lasted less than three minutes, and more than 3/4 lasted less than four minutes.

Furthermore, based on RX-22-33, the total duration of all calls during the year was 5,004.5 minutes. If each of the nine Hillsboro, Oregon Cable Systems employees worked four ten-hour shifts per week, for 50 weeks of the year, then those employees worked a total of 18,000 hours, or 1.08 million minutes. The calls between the two groups, then, accounted for less than five-tenths of a percentage point of the total time worked by those employees during the year. For the many more existing unit employees in Alaska, the average time spent speaking to Cable Systems employees would be even smaller.

Even if the parties disagree about the *extent* of contact between the two groups by telephone, no real dispute exists that landline telephone conversations represent the primary means of communication amongst existing unit and Cable Systems employees. Tr. 500, 519, 835, 965. Such reliance on telephone-based contact weighs heavily against any assertion of a shared community of interest. *Michigan Bell Tel. Co.*, 192 NLRB 1212 (1971) (relying on fact that employees at other sites only communicated via telephone calls to find absence of community of interest).

Furthermore, the Board regularly finds separate communities of interests where, as here, virtually no interchange occurs. *Hilander Foods*, 348 NLRB 1200, 1203–04 (2006) (relying upon only "minimal" temporary transfers and "only 8 or 9 permanent transfers involving the [location at issue] over a 3 ½ [year] period") (*citing Red Lobster*, 300 NLRB 908, 911 (1990) (finding insufficient interchange based on only 19 of 85 employees working temporary out-of-group assignments in a year)); *Alamo Rent-A-Car*, 330 NLRB 897, 898 (2000). The Regional Director's

reliance on the lack of in-person visits between the groups, and only two employee transfers over the course of nine years, is consistent with a clear lack of interchange. The Board has held that the frequency of employee interchange is a critical factor in determining whether employees who work in different groups share a community of interest. *Executive Resource Associates*, 301 NLRB at 401 (1991) (citing *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1015 (9th Cir. 1981)). Against such a background of virtually no interchange and limited contact, the Regional Director clearly erred by finding this combined factor's importance "neutral." This factor, like the many others, weighs against a community of interest.

4. The Regional Director found that two individuals directly supervise only Cable Systems Group work, but nonetheless weighed common supervision "strongly" in favor of a community of interests.

The DDE devotes over two pages of analysis to specifically finding two Cable Network Operations Supervisors to be statutory supervisors, but shortly thereafter concludes, "the common supervision factor weighs strongly in favor of finding a community of interest[.]" DDE at 20–22, 27. The Regional Director attempts to explain this contradiction by asserting, "the majority of § 2(11) supervisory duties are shared and superseded by Anchorage-based managers" higher in the chain of command. *Id*. at 27.

To the contrary, the record establishes that, in addition to hiring authority, Cable Network Operations Supervisors Jeffrey Holmes and Anatoliy Pavlenko directly supervise nearly all day-to-day aspects of Cable Systems Group work. They approve travel, vacations, shift coverages, and timesheets for Cable Systems employees. RX-39, 42; Tr. 98, 202, 289, 486, 838–40, 909–12, 944, 965–66, 1028–31, 1056–61, 1103–04, 1164, 1263–64. Furthermore, they lead staff meetings, assign job duties, approve overtime, evaluate and coach employees, and decide work allocations. Tr. 113, 258, 909–11, 988, 1062, 1081–82, 1086. They also discipline employees and recommend

promotions. Tr. 978–79, 1067–69, 1073–74. Multiple documents further show they approve work procedures for the Cable Systems Group. RX-4–11; Tr. 968–77, 1011–12.

Holmes and Pavlenko report to Senior Network Operations Specialist Greg Tooke and Senior Manager of Network Services Management Thomas Brewer, who are based in Alaska. Tr. 861. Consequently, Holmes and Pavlenko are ***the only supervisors overseeing Cable Systems work in Oregon***.

Ignoring these highly impactful roles played by the Cable Network Operations Supervisors, the DDE relies instead upon much less routine facts, such as the role of senior Alaska-based management in annual evaluations, and their occasional visits to Cable Systems sites. DDE at 27. Similar to his analysis of other factors, the Regional Director fails to explain how such limited roles by senior managers can overcome the direct day-to-day supervisory duties of individuals devoted solely to the Cable Systems Group. Even more troublingly, he does not articulate how such facts could lead to a finding that, "the common supervision factor weighs strongly in favor of finding a community of interest[.]" DDE at 27. In fact, Holmes and Pavlenko *separately* supervise the Cable Systems Group, and thus the supervision factor weighs *strongly against* combination of these two groups. Board community of interest standards require that *day-to-day* and *local* supervision must receive the greatest weight. *Red Lobster*, 300 NLRB 908, 911 (1990) (relying on significant authority vested in restaurant general managers); *Cargill, Inc.*, 336 NLRB 1114, 1114 (2001) (emphasizing "significant local autonomy"); *Purity Food Stores, Inc.*, 150 NLRB 1523, 1527 (1965). Here, the DDE itself identifies the Employer's Cable Network Operations Supervisors as the day-to-day and local supervision of the Cable Systems Group, and only the Cable Systems Group. The facts and the law thus show that Regional Director could do

nothing other than find that this factor weighs against a community of interest. To find otherwise represents a clear error.

5. Employees in the two groups perform different duties, using different skills, due to the differing purposes of their business units.

The DDE acknowledges the major differences in job duties between the two groups, but fails to analyze them rationally. It explains:

> The most notable difference is that the Oregon employees have the responsibility for monitoring and servicing undersea data cables, while the Alaska Unit employees primarily monitor terrestrial cables and nodes . . . None of the employees in the Alaska Unit are stationed out of a remote cable landing station. None of the employees in the Alaska Unit physically work on the undersea fiber optic cables. The Cable Systems Group also has proprietary software to monitor and remotely operate the physical plants and landing facilities, software of the kind that the Alaska Unit does not normally utilize.

DDE at 27–28.

In essence, the portion of Cable Systems Group work the Regional Director describes as different from existing unit work is *the entire scope of that work*. Meanwhile, existing unit work also possesses its own unique features. For example, the Record reflects that the one employee who transferred from the existing unit to the Cable Systems Group did so because he failed to meet the minimum bargaining unit qualifications. Tr. 1123–24.

Even job titles and job descriptions differ. Tr. 58, 747; *compare* UX-26–29, 32 *with* UX-1, 5, 7, 30. As a Petitioner representative confirmed, it negotiated the bargaining unit's different job descriptions. UX-26–29, 32; Tr. 743–45. She admitted these negotiations serve to provide the unit with job security. Tr. 745–46. The Petitioner's bargaining goal ensures that only bargaining unit members perform those jobs. Tr. 745–46, 750–51.

Employees in the existing unit's primary facility watch 6,500 devices on their electronic ("Netcool") platform, while the Cable Systems Group only watches 50–65 devices. Tr. 191. The

Anchorage facility monitors devices all the way into customer's homes, while the Cable Systems Group does not perform that function. Tr. 1158–62.

Beyond these different duties, the record is unrebutted that the Cable Systems Group has over 60 policies that apply only to Cable Systems, and that Alaska Communications Human Resources personnel did not know even existed prior to the hearing. RX-4–11; Tr. 1119. In fact, those Human Resources staff members could not even access the Cable Systems Group policies without assistance from the Cable Systems Group supervisor Holmes. Tr. 1119–20.

Moreover, the evidence is again unrebutted that, while some Cable Systems employees may be capable of performing bargaining unit tasks, not a single bargaining unit member can perform all of the duties of the Cable Systems Group's employees. Tr. 1035, 1267–68. In contrast, the record makes clear that Oregon Cable Systems Group employees, including Kelley and Huff, all perform the same or similar job duties. Tr. 462, 1259.

Despite these striking differences, the Regional Director relied upon similarities in some ***equipment*** utilized by the two groups to weigh this factor in favor of a combined unit. DDE at 28. This reliance was misplaced. As explained above, a normal work day in the existing unit differs significantly from a normal day in the Cable Systems Group for many reasons. These differences strongly support the need for separate units, regardless of any equipment overlap. As a result, the Regional Director should have found employee duties and skills to weigh in favor of separate units. *Potlatch Forests, Inc.*, 94 NLRB 1444, 1447 (1951) (employees working with separate supervision, using distinct skills and working different hours "enjoy a sufficient community of interest, apart from that of the remaining employees" so as to warrant a separate unit).

To the extent the Union or even the Board want to claim that the separate business units do perform similar duties, that argument still demonstrates no community of interest. The Board has

specifically found no community of interest where the distinct groups are "virtually interchangeable," but no interchange actually occurs. *Essex Wire Corp.*, 130 NLRB 450, 453 (1961) (finding no community of interest where jobs were "virtually interchangeable" but "there was in fact no interchange"); *See also Combustion Engineering*, 195 NLRB 909, 912 (1972). Simply put, this factor weighs against a community of interest.

6. Multiple organizational and practical barriers between the two groups minimize functional integration.

The parties devoted more time at hearing to the factor of functional integration than virtually any other. For his part, the Regional Director acknowledged:

> [I]t is clear that some tasks performed by the Cable Operations Group are discrete and not well integrated into the operations of the employees in Anchorage and the rest of ACS' operations. No Alaska Unit employees routinely service manned undersea fiber optic cable landing stations. No Alaska Unit employees perform remote power generation monitoring, hardware repair and replacement, or HVAC duties, either on the Oregon Coast or on the unmanned repeater lines that run from the Oregon Coast all the way to the Seattle co-location facility.

DDE at 29.

Notwithstanding these important facts, however, the Regional Director again focused on the nature of the Employer's services to find, "the unique nature of a remotely-monitored large-scale broadband data transport network indicates that these geographically disparate employees are nonetheless more functionally integrated than not." *Id*.

This conclusion ignored several fundamental elements of Cable Systems Group operations. First, and most importantly, the record repeatedly reflects that the nine years since that group's acquisition by the Employer have seen very few successful integration efforts. Tr. 365, 531, 822, 1006–07, 1085–86, 1186–87, 1210. In fact, during his tenure, former Cable Systems Senior Manager Bill Kositz intentionally maintained separation of the existing unit's network from the

Cable Systems Group by removing hard drives and connections, as well as operational steps such as maintenance of different daily logs. Tr. 1186.

This lack of integration follows from the fact that the two groups serve entirely different customer bases. The network that existing unit employees work on serves the Employer's broader business purposes, including by meeting consumer needs going all the way into residential consumer homes, while the Cable Systems Group almost exclusively handles contracts with large corporate telecommunications carrier customers. Tr. 165–68, 172, 185, 197, 242–43, 252, 433, 482, 519–20, 533–35, 1019–20, 1027; *Sears, Roebuck & Co. (Flint, Mich.)*, 151 NLRB 1356, 1358 (1965) (where employees' primary activity "has a degree of functional difference and autonomy (including geographic and supervisory separateness)," a separate unit is warranted.).

Due to these historical and customer-driven differences, the network managed by existing unit employees and the Cable Systems Group are functionally separate networks, which use different "nodes" and equipment. Tr. 167–70, 199–200, 331, 471–72, 510–13, 516, 526, 542, 982–87, 1186. As explained by supervisor Jeffrey Holmes, who has worked in the Cable Systems Group since its acquisition, **"[the predecessor's] former network and the ACS corporate are not connected. They never have been. They can't be."** Tr. 934, 1025 (emphasis added).

Connections between the two networks are largely theoretical because the Employer prohibits employees from accessing the other group's networks without permission. Tr. 162–63, 177–78, 195–96, 239–41, 270, 310–11, 444–45, 449, 460, 517–22, 527, 530, 540–42, 751–52, 785, 849, 949–51, 959–60, 987–88, 1035–38, 1074–76, 1216–17. The Petitioner itself has protested occasions when Cable Systems Group employees accessed the existing unit's network. Tr. 179–80, 204–06. Furthermore, the Employer's Netcool electronic system "filters out" all views

of the other system. Tr. 192, 220, 523–24. The Record reflects employees clearly know these boundaries. Tr. 179–80, 204–06.

In fact, the Company has so clearly defined those boundaries that special procedures exist for the possibility that cross-network access would be required during an emergency. The Employer's "KVM" disaster recovery cable could theoretically provide Oregon employees with access to the existing unit's network in the event of an emergency. UX-4; Tr. 1201. The Cable Systems Group has never used it nor has the Alaska bargaining unit. UX-4; Tr. 194, 197, 207, 466–67, 1184. Moreover, the cable itself remains physically unplugged, as confirmed by RX-3:

From: Holmes, Jeffrey R.
Sent: Wednesday, September 27, 2017, 1:14 PM
Subject: Hillsboro NOC: - KVM access for INMC
To: Brewer, Thomas G.
Cc: Hillsboro NOCC

FYI – Please see the thread below.

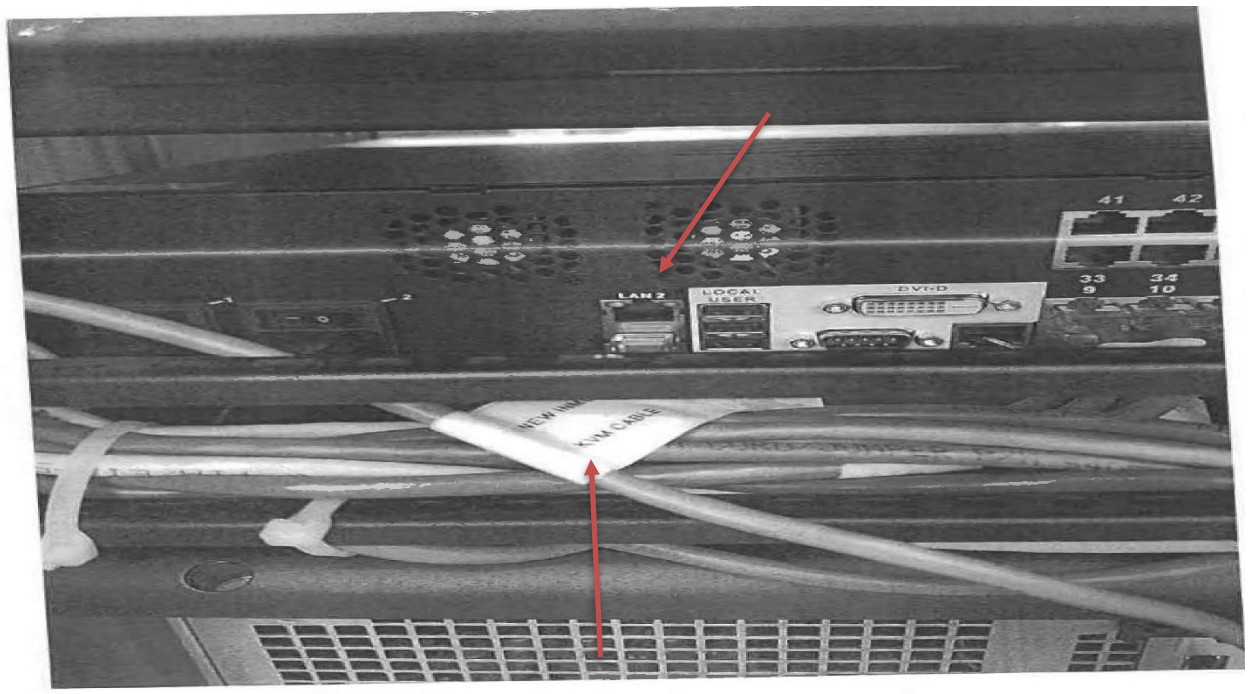
Jacob is creating a group along with username/password for the INMC (Raritan III) . If you are called to connect the cable then please plug into the LAN2 Port of the Raritan, but until further notice this will remain disconnected.

We used the connection from the tower in the NOCC Cabinet that was used for INMC Camera monitoring.

We will work together to complete a Hillsboro DR Handbook for the INMC.

Regards,

Jeffrey



RX-3; s*ee also* Tr. 952, 1046–47, 1077.

The Regional Director ignored these clear boundaries between the work of the two groups, and instead viewed the overall electronic system as "different phases of the same product." DDE at 29. This analysis misses the mark by a wide margin. The Employer does not operate an assembly line upon which Cable Systems employees perform one task, and the bargaining unit performs the next. To the contrary, the Employer's employees possess technical expertise tailored to different systems, for different customers, based on continued historical divisions between each groups' work. Barriers of both policy and physical connections undermine attempts to construe the work as functionally integrated. The Regional Director thus should have weighed the absence of functional integration in favor of separate units, but instead erred by arriving at the opposite conclusion. *Utica Mutual Insurance Company*, 165 NLRB 964 (1967) (noting the physical separateness of employees is one factor weighing against finding a community of interest).

7. The Regional Director cited no identical terms and conditions of employment between the two groups, but nonetheless assigned the factor a "neutral" impact.

The Regional Director's conclusion regarding terms and conditions of employment also fails to follow from the facts cited. He stated, "[t]he combination of similar hourly wages and some similar universal policies and benefits, but differences regarding pension benefits, health insurance, and other bargaining for benefits, lead me to conclude this factor is neutral[.]" DDE at 30. This statement leaves clear the fact that neither the wages, nor "some" policies the Regional Director relies upon, are identical between the two groups. These differences between otherwise "similar" terms and conditions exist because the Parties have determined all terms and conditions of employment for the existing unit via collective bargaining, while the Employer has always possessed full discretion to set terms and conditions for the Cable Systems Group.

For example, while UX-13 represents an Employer policy on compensation that applies to the Cable Systems Group, the CBA controls compensation for bargaining unit employees. (Tr. 762–64). Last year, the Cable Systems Group experienced a 4.5% pay cut, while bargaining unit members obtained a 1.5% wage increase, which demonstrates a separate community of interest. Tr. 492, 1124. *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962) ("[f]actors considered by the Board in determining community of interest among employees include . . . a difference in method of wages or compensation"); *Roman Catholic Archdiocese*, 216 NLRB 249 (1975) (separate compensation system weighs against finding of community of interest). Also last year, the Employer furloughed existing unit employees, but did not furlough any employees in the Cable Systems Group. Tr. 1145. In addition, the Cable Systems Group receives a bonus as part of the employee compensation package, while existing unit members do not. Tr. 1127. Well-established Board precedent holds that differences in the system of compensation, like those here, demonstrate

separate interests. *Miller & Miller Motor Freight Lines*, 101 NLRB 581, 581–82 (1953) (relying on difference in pay scales to reject multi-location unit).

Other important differences also result from this distinction. The Cable Systems Group has a sick leave policy that only applies to them. UX-17; Tr. 287–89. Employees in the Cable Systems Group have unlimited flexible leave, but the CBA provides accrual of 4.62–10.77 hours per pay period for represented employees depending on length of service. UX-30, Art. XII; Tr. 1128. Multiple other Employer policies apply to the Cable Systems Group, like the RIF/Severance Policy, Overtime Policy, and Recruiting and Hiring, but do not apply to bargaining unit members. RX-14, 15, 16. The Cable Systems Group does not use seniority, and those employees work ten hours per day, four days a week. Tr. 51–52, 255. As the DDE acknowledges, existing unit employees receive pension contributions, while Cable Systems employees do not. DDE at 30. *Trustees of Boston Univ.*, 235 NLRB 1233, 1236 (1978) (differences in benefits, among other factors, weighs against finding a community of interest).

Despite these many differences, the Regional Director focused on a categorization of wages as being "similar," and "some similar universal policies," to disregard this factor's impact in the ultimate community of interests analysis. In fact, the differences in virtually every term and condition of employment properly weigh heavily in favor of separate units.

8. <u>The existing unit possesses a long history of comprehensive collective bargaining, while Cable Systems employees have experienced no such history.</u>

The record leaves no doubt that no bargaining has occurred on a wider geographic basis. The current CBA specifically states it only applies to the state of Alaska. UX-30; Tr. 758. The CBA controls represented employees' terms and conditions of employment, including, for example, seniority. Tr. 758–62; 1118. Employees under the CBA receive disciplinary forms, while non-bargaining unit members only receive emails regarding corrective actions. Tr. 1069.

As the Petitioner itself agrees, the CBA and past practice control all Employer policies regarding the existing unit. Tr. 764–69. At least one Employer policy that applies to all employees, including the Cable Systems Group, specifies that the CBA controls if a conflict exists. UX-12; Tr. 766. Additionally, the Employer furloughed bargaining unit members last year, but not Cable Systems Group employees. Tr. 1145.

The Petitioner itself has contributed to the creation of these differences. For example, during the most recent round of bargaining, the Employer proposed to include bargaining unit members in the current non-unit health plan, but the Petitioner rejected that proposal. Tr. 774; 1127. **In other words, the Petitioner specifically bargained to prevent bargaining unit members from sharing similarities with the Cable Systems Group.** Additionally, the over 60 Cable Systems-specific policies discussed *supra*, which even Human Resources personnel could not access, demonstrate divergent working conditions. RX-4–11; Tr. 1119–20.

The Regional Director acknowledged this important difference between the two groups. However, like other factors weighing against their combination, he sought to minimize its impact rather than factoring it into the overall analysis. Specifically, he essentially read bargaining history out of the analysis by concluding, without further elaboration, "the Board will not adhere to bargaining history 'where the unit does not conform reasonably well to other standards of appropriateness.'" DDE at 31 (quoting *Crown Zellerbach Corp*., 246 NLRB 202, 203 (1979)). *Crown Zellerbach*, as the quotation suggests, relates to a *lack* of a community of interests. Furthermore, for the reasons discussed above, all other factors weigh against a community of interest, and thus a *fortiori* "conform reasonably well" to separate units. Nonetheless, the Regional Director refused to consider the significant differences resulting from the two groups widely divergent bargaining histories. As a result, the Regional Director's treatment of the difference

between extensive bargaining history in the existing unit on one hand, and no such history on the other, highlights yet another glaring flaw in his analysis.

The Board cannot allow such a faulty analysis to prevail. For all the reasons discussed above, *and because of different bargaining histories*, the evidence establishes a need to maintain the two groups' separate identifies here. The Board must account for these differences because bargaining history analysis plays an important role in community of interest determinations in general. *ADT Security Services Inc*., 355 NLRB 1388 (2010) (relying upon "service territory" covered by previous collective bargaining agreement in determining whether bargaining unit remained appropriate); *PCMC/Pacific Crane Maintenance Co.*, 359 NLRB 1206, 1210 (2013) (relying, in successorship context, upon fact that certain aspects of employment relationship were amenable to bargaining with one group's labor organization, but not the other), incorporated by reference at 362 NLRB No. 120 (2015). The Board places particular emphasis on whether bargaining on a broader basis has ever occurred in its geographic community of interest determinations. *Colorado Interstate Gas Co.*, 202 NLRB 847, 848–49 (1973) (analyzing bargaining history of subsequently-decertified group within petitioned-for unit). Here, that has not occurred and the Union has specifically sought to thwart similarities between the two groups. This factor weighs against a community of interest.

B. The Separate Communities of Interest Require Two Independent Bargaining Units.

All of the community of interest factors weigh against combined units. The inclusion of Anchorage employees Kelley and Huff cannot alter the Regional Director's own conclusion that the combined unit the Petitioner requested is ***not appropriate.*** DDE at 23. In fact, the only community of interest factor affected in any meaningful way by its inclusion is geographic proximity. As discussed above, that factor continues to support separate units even with Kelley

and Huff included. Additionally, the other factors weigh so heavily against a common community of interests that the overall evidence would overwhelm any small impact their inclusion could have on one factor.

One other consideration also demonstrates the need to maintain the two groups' separate identities. As a matter of policy, inclusion of the Cable Systems Group in the existing unit would disrupt a stable bargaining relationship, while also operating to the disadvantage of the added employees. The parties have established a functioning bargaining relationship in Alaska, with the Petitioner representing the unit for a quarter-century. Tr. 681. Furthermore, the Petitioner itself only maintains union halls in Alaska, and is thus ill-prepared to spread its representational duties across thousands of miles to another state. UX-7; Tr. 565.

Importantly, the existing unit contains 320 employees, while the Cable Systems Group contains only 15. DDE at 3. The Board disfavors circumstances allowing smaller groups to be subsumed within much larger ones, to the detriment of the smaller group's interests. *Great Lakes Pipe Line, Co*., 92 NLRB 583 (1950) (explaining the Board is duty-bound "to prevent injustice being done to minority groups by . . . . arbitrary inclusion of such groups in a larger unit wherein they would have no effective voice to secure the benefits of collective bargaining."). Those concerns become of particular importance here where the existing unit possesses a history of relying on seniority for terms and conditions of employment. UX-30, Art. 6. Since the Cable Systems employees work for a business subdivision acquired more recently, their lack of seniority would inevitably result in unfair disadvantages to the group as a whole. Worse, under the parties' contract, "Bargaining Unit Seniority (Seniority) for Regular employees is defined as the length of service since last employed by the Company **in classifications covered by this Agreement.**" *Id*. at Art. 6.1.A (emphasis added). As a result, the Region should not disturb the stable bargaining

history the parties have achieved in Alaska, nor should it interject Cable Systems employees into that history through an unsupported combination of groups.

Simply put, the Regional Director's attempt to assist the Petitioner by adding employees Kelley and Huff to a concededly inappropriate unit cannot stand. Even putting aside the procedural and due process deficiencies in this approach, their inclusion does not detract from the separate and distinct communities of interests between these two groups. Consider for example, the Regional Director conducted ***absolutely no analysis*** regarding whether Kelley or Huff work with any Alaska based represented employees at all. The record clearly establishes the two groups' different geographic, organizational, functional, and overall work identities, as well as other significant differences. The Board must therefore reverse the Regional Director's decision and treat the two groups as separate bargaining units.

VI. THE REGIONAL DIRECTOR FAILED TO DISMISS THE PETITION DESPITE THE UNION FAILING TO COMPLY WITH RULE 102.61(12)

The Board's April 2015 Representation case Rules impose strict requirements on all parties. Employers must promptly post pre-hearing Notices of Petition, submit pre-hearing Statements of Position, and lock in their views on the election and unit scope before the hearing. Failure to do so results in significant legal consequences.

Likewise, the Regions must expeditiously obtain stipulated election agreements, ensure that all paperwork is in order before docketing a petition, and provide electronic versions of multiple Notices.

Petitioners must also strictly abide by these rules, or face significant legal consequences. Their primary obligations under the 2015 Rules pertain to petition drafting and service. The Petitioner here failed to comply with the Rules in its completion of the petition by failing to set forth all of the information required by the Rules.

Section 102.61 states that the petition "shall contain" certain specified pieces of information. This mandatory language establishes the Rule's requirements as a condition precedent to finding that a petitioner validly filed a petition. Here, the Petitioner omitted three important pieces of information from the Petition.

Section 102.61(12) requires, "[t]he type, date(s), time(s) and location(s) of the election sought." The instant petition sets forth only that Petitioner seeks a mail ballot election, but fails to specify any dates or times for such a mail ballot election, or the ballot count, or the location of the count. It is impossible for the Employer to respond to the Union's positions on these matters when the Petitioner has advanced no position. Instead, the Petitioner forced the Employer to adopt a position on a critical issue without any real knowledge of where the Petitioner stands.

The Petitioner's failure to propose election details is particularly problematic due to the corresponding obligations placed on the Employer. The Board required the Employer to submit a pre-hearing Statement of Position, under penalty of preclusion.[2] First, however, the Rules require the Petitioner to adopt stances on its election proposals so the Employer can respond with informed positions. The Petitioner's failure to specify dates, times, or a location threatens to create a system of asymmetric obligations. Such a system would leave employers constantly grasping at air.

The Board confirmed the rigidity of the 2015 Rules' requirements in *URS Federal Services, Inc.*, 365 NLRB No. 1 (2016), stating,

> [W]e expect regional directors to enforce these [] requirements – whether an employer or union has failed to meet [them] – so that all parties take their obligations seriously under the amended Rules. To allow parties to ignore the [] requirements . . . without any explanation or excuse would undermine the purpose of those provisions.

[2] The Petitioner even attempted to use Statement of Position preclusion as a sword against the Employer during discussion of an evidentiary issue at hearing. Tr. 1071–72.

Neither the Board nor the Rules leave the Region with any discretion here. The Employer in *URS Federal Services* argued, unsuccessfully, that any error on its part was harmless because the union received the voter list from the Region within the time limits for service, and thus the union was not prejudiced. The Board strongly and unequivocally rejected that argument. The Regional Director must apply the same strict standard to the Petitioner here.

The Region excuses the Union's failure to include necessary information on the petition based on the fact the Union sought a mail ballot election – arguing that there is no set date, place, or time for a mail ballot election so the Union had no strict duty to comply with the requirements of the Rules; however, the Rules do not render this information "optional." Furthermore, this represents the most spurious of arguments. Regions distribute mail ballots at a certain date and time. In fact, the Decision and Direction of Election specifies the date and time as the Case Handling Manual on Representation. Requires. Casehandling Manual on Representation §11336.2(b); DDE at 33; *see also Elon University,* 10-RC-231745, https://www.nlrb.gov/case/10-RC-231745; *Emergent Health Partners*, 7-RC-231720, https://www.nlrb.gov/case/07-RC-231720. Board law further leaves absolutely no doubt that date and time of election matters on mail ballots because it triggers different obligations, such as when an employer must comply with *Peerless Plywood* or when an employer must post mandatory notices under the Rules. *Oregon Washington Telephone Co.*, 123 NLRB 339 (1959) (holding the *Peerless Plywood* rule applies as of the time and date when ballots are mailed to employees); *Guardsmark, LLC*, 363 NLRB No. 103 (2016) (holding that the Peerless Plywood rule applies as of 24 hours prior to the time and date when ballots are mailed to employees). To claim no set date or time for a mail exists misstates the law to facilitate alleviating the Union of its duties to comply with Section 102.61.

In addition, Section 102.61 states that the petition "shall contain," among other information, "the type, date(s), time(s) and location(s) of the election sought." This is a mandatory directive within the Rules that cannot lightly be forgiven. The Rules similarly require that the employer "shall post the Notice of Petition for Election" (29 C.F.R. § 102.62(a)(2)), the employer "shall file . . . a Statement of Position" 29 C.F.R. § 102.63(b)(1)). The employer's failure to comply with these requirements can result in a rerun election. The Union's failure in this case should not be treated differently. An employer cannot ignore its obligations under the Rules merely because of the method of election and the Board likewise should not excuse the Union from compliance. The Regional Director's decision in this case solely holds the burden for complying with the Board's Rules on the Employer and holds the Union completely harmless for its failures. Such a double standard cannot stand.

Similarly, the Regional Director relies on *Aria Resort & Casino, LLC*, 363 NLRB No. 24, slip op. at 1 (2015), in support of his failure to dismiss the Petition. In so doing, the Regional Director ignores that merely filing a petition remedies a union's failure to indicate that it requested representation – if the employer wants to recognize the union, it can do so at that time and if it does not, the Region can process the petition. The Board has long held that a failure to note whether representation was sought is a *de minims* defect that does not warrant dismissal. *See Mound City Products Co.*, 79 NLRB 1247 (1948). The rationale for excusing a union's failure to indicate it requested representation and an employer denied that request cannot be extended to the technical deficiencies in this case. If the Union fails to seek recognition prior to filing a petition (or merely fails to check a box indicating such), the petition itself demonstrates the Union's desire to be recognized. In contrast, the petition in this case by its very nature does not disclose the dates, times, or location of an election, which represents the very crux of the election process: when the

employees actually vote! Instead, the Employer needed to respond with its proposed details unilaterally. Had the Union provided the mandatory details, the Employer would have been able to determine whether the Union's proposal was reasonable. It could not. The Employer was left to its own devices to guess what might be appropriate in this case. This is exactly what the Board, by its Rules and the mandatory filing requirements therein, seeks to prevent. The Regional Director needed to dismiss the petition where it failed to include mandatory information required by the Rules and deprived the Employer of the opportunity to respond appropriately.

The mandatory language of Rule 102.61, and the Petitioner's failure to comply with it, means the Petitioner ***never filed a valid representation petition in this matter*****.** For all of these reasons, the Regional Director erred by failing to dismiss the Petition, with prejudice, for non-compliance with Rule 102.61(12).

VII. CONCLUSION

Based upon the foregoing, the Employer respectfully requests that this Request for Review be granted and that the Certification of Results be set aside.

DATED this 21st day of February, 2019.

Ogletree, Deakins, Nash, Smoak and Stewart, P.C.

By: 

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Attorney for Alaska Communications Systems Holdings, Inc.

CERTIFICATE OF SERVICE

CASE NO.: 19-RC-226955

The undersigned certifies that on the 21st day of February 2019, the foregoing, **EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION,** was filed via electronic filing and served via e-mail upon:

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